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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 145.

THE UNITED STATES,

Petitioner,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY *and* THE NORTHERN PACIFIC RAILWAY COMPANY.

BRIEF FOR APPELLEES.

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JAMES B. KERR,
Counsel for Appellees.

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STATEMENT.

This suit was brought by the United States against the Northern Pacific Rail*road* Company and Northern Pacific Rail*way* Company to cancel patents issued by the United States to the Rail*road* Company to about 48,458 acres of land. The pat-

The question is whether the lands within the "Overlap" were appurtenant to the line from Portland to Puget Sound, and whether being so appurtenant they passed to the Railroad Company under the Joint Resolution of 1870. The Interior Department prior to July 18, 1895, uniformly held these lands to pass under the grant contained in the Joint Resolution, and under that ruling patented a large part of them (48,458.81 acres) to the Railroad Company. But on July 18, 1895, Secretary Smith, in *Spaulding v. N. P. Railroad Company*, 21 L. D. 57, reversed the established rule and held that they did not pass under the grant of 1870, because at the date of that grant they were reserved or appropriated under the earlier grant of 1864 to the same company (see also 23 L. D. 70). Since then lands have, under the rule of the *Spaulding Case*, been patented adversely to the Railroad Company to the extent of about eleven thousand acres.

It appears from the answer and exhibits A, B and C, attached thereto, that a large part of the lands patented to the Railroad Company have been sold to settlers (Transcript, pp. 29-31 and 62-71) who claim *under* the company's title. Such settlers as claim *adversely* to the company will probably be protected, however this case is decided, under the act of 1898 (30 Stat. 620).

The question being, whether these lands were on May 31, 1870, reserved or appropriated by virtue of the grant of July 2, 1864, or by virtue of any map filed or act taken under the grant, so that they did

not pass under it, it is to be noted that the *grant itself* did not reserve the lands.

The grant of the Act of 1864 (sec. 3) was of land to which

> "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

The *settled* construction of this grant is, that it did not reserve or appropriate any land, or take it out of the disposing power of Congress, until the line of road was *definitely* located by map filed as the Act requires. *Northern Pacific R. R. Co. v. Sanders*, 166 U. S. 620, 634, 636; *Menotti v. Dillon*, 167 U. S. 703, 720; *United States v. Oregon etc. R. Co.*, 176 U. S. 28, 43; *Nelson v. Northern Pacific Ry. Co.*, 188 U. S. 108, 119.

Therefore the inquiry is further narrowed to this: *Had the line Wallula to Portland been definitely located when the Joint Resolution of* 1870 *was passed?* Upon this question the facts are as follows:

On March 6, 1865, Josiah Perham, president of the Northern Pacific Railroad Company, transmitted to the Secretary of the Interior a sketch of the "general line" of the railroad. A copy of this map is Exhibit A (Transcript, volume "Exhibits"). It shows two lines commencing at Lake Superior running westerly and converging near the eastern boundary of the then territory of Dakota, and one

line extending west therefrom to a point in the territory of Washington near the Columbia guide meridian. From this point one line extends southwest along the valley of the Columbia river to a point near Portland thence north to Puget Sound, while another line extends from the point of divergence over the Cascade mountains joining with the first line on Puget Sound.

Upon receiving this map, the Secretary of the Interior transmitted the same, describing it as a map showing "The general line of the Northern Pacific Railroad," to the Commissioner of the General Land Office, with a recommendation that the lands be withdrawn along the line so delineated. The Commissioner of the General Land Office upon receiving the map and the Secretary's letter, addressed the Secretary under date of June 22, 1865, giving reasons why the map should not be accepted, specifying, among others, that it was so indefinite as to give no basis for any withdrawals, and that in other respects it was not in conformity with the existing rules and regulations. The letter of the Commissioner shows an endorsement to the effect that the Secretary sustains the Commissioner's refusal to approve the map. The records of the board of directors of the Northern Pacific Railroad Company from the date of its first meeting and until May 18, 1865, show no action with reference to locating the line of road and show no action conferring authority upon the president to locate the line. The powers of the president, as conferred by the by-laws, are set out in the agreed statement of facts and show no author-

ity in him to take such action. Except as above stated, the Interior Department has never taken any action under or relative to the map in question and has never made any withdrawals of land thereunder (Transcript, pp. 85-95).

On July 30, 1870, two maps of *general* route were transmitted to the Secretary, copies of which are Exhibits B and C (Transcript, volume "Exhibits"). One of these maps shows a line starting at the mouth of the Montreal river, on the boundary between Wisconsin and Michigan, and extending westerly over and across the states of Wisconsin and Minnesota, and the territories of Dakota and Montana to a point at the mouth of the Walla Walla river, in the territory of Washington. The other shows a line starting at the mouth of the Walla Walla river extending down the valley of the Columbia river to a point near Portland; thence northerly to a point on Puget Sound. These maps were, on August 13, 1870, by the Secretary transmitted to the Commissioner of the General Land Office with instructions to withdraw and hold reserved lands within twenty miles on each side of the route so designated (Transcript, pp. 95-104).

It will be noted that these *instructions* to withdraw on *general route* were issued nearly three months after the Joint Resolution of 1870 was passed; and that the map from Portland to Puget Sound and any withdrawal under the same were referable only to the *Joint Resolution, the Act of* 1864 *not authorizing that line.*

No portion of the line from Wallula to Portland

was ever definitely located (Transcript, p. 135).

On September 13, 1873, the Railroad Company filed, under the *Joint Resolution*, a map of *definite* location of the line from Tenino to Kalama, and on September 22, 1882, it *definitely* located the remainder of the Portland-Puget Sound line (Transcript, pp. 104-107). Maps of these definite locations were duly accepted by the Department and the lands appurtenant to them, including the lands in suit, were withdrawn from sale.

All the lands in suit are opposite to and within the place limits of the line covered by the Joint Resolution. They are also opposite to the unlocated and unconstructed line from Portland east described in the act of 1864 (Transcript, pp. 133-4).

The lands in suit were on May 31, 1870, when the Joint Resolution was passed, and also on the dates of definite location of the railroad opposite them, public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, except as they may have been reserved or appropriated by the Act of July 2, 1864, or by the maps filed, and the acts of the company done, under that Act (Transcript, p. 134).

The railway from Portland to Puget Sound was duly completed as located and was accepted by the Government (Transcript, pp. 134-5).

The defendant Northern Pacific *Railway* Company has succeeded to all the rights of the defendant *Railroad* Company.

ARGUMENT.

We think all the questions presented in this case have been conclusively determined against appellant in *United States v. Oregon & California R. Co.*, 176 U. S. 28; and the Circuit Court so held (Transcript, pp. 144-148). The Circuit Court of Appeals certifies that the issues and facts in this case are identical with those in the *Oregon & California case*, except that the Northern Pacific Company is the grantee in both over-lapping grants (Transcript, p. 166). The certificate of that court is we think unusual in not stating or suggesting that the court had any doubt as to how the case ought to be decided.

The government will be driven to contend that the lands in suit were appropriated or reserved under the earlier grant of July 2, 1864, to the same company or by virtue of the maps filed or acts done in pursuance of that grant. As the grant itself did not make a reservation or appropriation of the lands, that must have been accomplished, if at all, by the filing of either the Perham map (March 6, 1865) or the general route map of July 30, 1870.

An examination of the case of *United States v. Oregon & California R. Co.*, will show that the decision controls this case. In that case it appeared that certain lands had been patented to the Oregon & California Railroad Company by the United States under the provisions of an Act of Congress approved July 25, 1866. By this Act Congress au-

thorized the California & Oregon Railroad Company, a California corporation, and such company as the legislature of Oregon should thereafter designate, to locate and construct a railroad between Portland, Oregon, and the Central Pacific Railroad in California, the Oregon company to construct that part of the line in Oregon beginning at Portland and running thence southerly by certain defined courses to the southern boundary of Oregon, where it was to connect with the part to be constructed in California by the California corporation. To aid in the construction of such railroad Congress made a grant of twenty sections per mile (ten on each side of the railroad line). The Act contained the usual exceptions of lands granted, sold, reserved or otherwise disposed of, and provided for a selection of indemnity in lieu of lands so disposed of. The legislature of Oregon designated the Oregon Central Railroad Company, of which the Oregon & California Railroad Company is the successor, to receive the grants made by the Act of July 25, 1866. On October 29, 1869, that company filed its map of definite location opposite to the lands in suit, and its map was accepted by the Secretary of the Interior January 29, 1870. It was contended that the lands in controversy, which had been patented to the Oregon & California Railroad Company, were reserved and appropriated for the benefit of the Northern Pacific Company under the Act of July 2, 1864, and by reason of the filing of the Perham map in 1865. The court considers at length the circumstances under which the

Perham map was filed, the indefinite character of the line shown thereon, and the action by the department when the map was filed; and, not passing upon the question whether the map constituted a valid location of the general route of the Northern Pacific Railroad, the opinion concedes, for the purposes of the argument, that the map might be regarded as a sufficient map of the "general route." The court then concludes that the effect of this map, even if valid as a map of general route, was not to appropriate the lands in controversy so that they would be excepted from the grant to the Oregon company, and held that the lands were not reserved when the Oregon company filed its map of definite location in 1869.

The Court, in *Doherty v. Northern Pacific Railway Company*, 177 U. S. 421, 432, affirming the decision of the Supreme Court of Wisconsin, holds that the Perham map was filed without authority and did not constitute a location even of the *general route* of the Northern Pacific Railroad, saying:

> "The views of the Supreme Court of Wisconsin on this subject may be properly quoted: 'On March 6, 1865, one Josiah Perham, then President of the Northern Pacific Railroad Company, filed with the Secretary of the Interior a map showing a proposed route of the proposed railroad. On this map appear two lines from a point in North Dakota to Lake Superior one ending at Duluth and one at the mouth of the Montreal River. The latter line is partially obliterated by a wavy red line through its whole length. It appears affirmatively that the president had no authority to make or file this map, and that the directors never author-

ized it; and further, that on June 22, 1865, the map was rejected by the Land Commissioner and by the Secretary of the Interior because it did not comply with the rules and regulations of the land department.'"

This decision was rendered upon the same state of facts presented in the case at bar with reference to the authority of President Perham to file the map in question.

The contention, that the lands in controversy were appropriated independently of the filing of any map, was urged upon the court in the *Oregon & California case*. Upon that point the Circuit Court of Appeals said (48 U. S. App. 1):

> "It is said that the grant contained in the act in and of itself, was 'an appropriation of the public lands.' Of what public lands? Of all the public lands situated within that immense belt through and along which the Northern Pacific Railroad Company was authorized to locate and built its road? Manifestly, if, prior to any designation by the grantee company of the line of road it was authorized to locate and build, the act making the grant, in and of itself, operated as an appropriation of any particular land, it operated as an appropriation of all public lands within the United States situated north of the 45th degree of latitude, and between the termini named in the act; for, prior to some designation of the route, it could not be known where the grantee company would find the most eligible railroad route, along which route it was authorized to build. We repeat, therefore, that prior to the designation of some route no distinction can be made between any of the public lands, not mineral, situated in the belt through and along which the Northern Pacific Railroad Company might have located and constructed its road. Is it

possible that all of that immense body of public land was, by the act of July 2, 1864, in and of itself, without any designation by the grantee company of the line of its road, withdrawn from subsequent grants? Undoubtedly not. In the case of *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Supt. Ct. 152, the supreme court said that the intent of congress in all railroad land grants, as has been declared by that court again and again was, that such grants shall operate at a fixed time, and shall take only such lands as at that time are public lands."

The case is controlled by another decision of this Court, *Wisconsin Central Railroad Company v. Forsythe*, 159 U. S. 46.

In that case the Wisconsin Central Railroad Company brought an action to recover a piece of land which lay within its ten-mile or granted limits, relying on a grant by the United States to the state of Wisconsin for its benefit by an Act approved May 5, 1864. It was urged as a defense to this action that on May 5, 1864, the land in question had been withdrawn by the land department in 1856 and 1859 to satisfy the previous grant made to the state of Wisconsin by Act of June 3, 1856, the benefits of which had been conferred by the state on the Omaha company. The court held, however, because the grant for the benefit of the Omaha company by the act of 1856 and the grant for the Wisconsin Central company by the act of 1864 had both been made to the state of Wisconsin, and inasmuch as the withdrawal of lands within the indemnity limits of the Omaha grant, which conflicted with the subsequent place grant for the benefit of the Cen-

ents were delivered May 23 and 27, 1895 (Transcript, pp. 135-6), and the lands lie in the state of Washington north of Portland in the state of Oregon. In the Circuit Court the decision was in favor of the validity of the patents and the suit was dismissed (Transcript, p. 144). The United States appealed and the Circuit Court of Appeals certified three questions (Transcript, pp. 166-7). This court upon motion of all the parties, granted a *certiorari* bringing up the entire record.

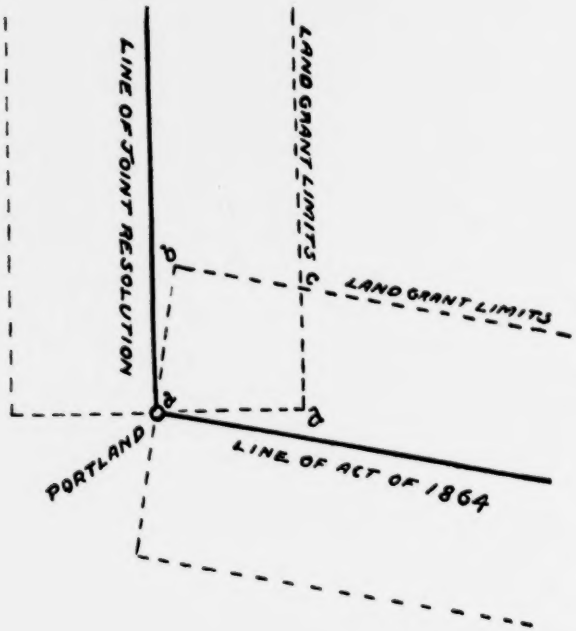
The facts were stipulated (Transcript, pp. 76-137) and are not complicated.

The Act of Congress July 2, 1864 (13 Stat. 365), granted lands to the Northern Pacific Rail*road* Company to aid in the construction of a railway from Lake Superior to some point on Puget Sound, with a branch *via* the valley of the Columbia river to a point at or near Portland in Oregon.

A Joint Resolution of Congress May 31, 1870 (16 Stat. 378), made an additional similar grant of lands to the same company for a line from a point at or near Portland to Puget Sound. By the Joint Resolution the line *via* Portland was designated as the *main* line and the line across the Cascade mountains as the *branch; U. S. v. N. P. Railroad Company*, 152 U. S. 284, 296.

The line east of Portland provided for in the Act of 1864 formed nearly a right angle at Portland with the line from there to Puget Sound provided for in the additional grant of 1870. For that rea-

son the two grants overlapped north of Portland as illustrated in the following diagram:



The "Overlap" in the foregoing diagram is the area included within lines ab-bc-cd and da. It contains the lands in suit.

The controversy grows out of the fact that while the line down the Columbia from Wallula to Portland described in the Act of 1864 was never built and the grant appertaining to the same was forfeited by Act of Congress September 29, 1890 (26 Stat. 496), the line from Portland to Puget Sound and thence east across the Cascade mountains was built and the grants appertaining thereto were earned.